

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1994

**FILED**  
**June 28, 1996**  
**Cecil Crowson, Jr.**  
Appellate Court Clerk

HUGH MELSON, )  
 )  
Appellant, )  
 )  
v. )  
 )  
STATE OF TENNESSEE, )  
 )  
Appellee. )

No. 02C01-9402-CR-00023  
Madison County  
Hon. William S. Russell, Judge  
(Post-Conviction)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

Joseph M. Tipton  
Judge

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**OPINION**

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\_\_\_\_\_The petitioner, Hugh Melson, appeals as of right from the Madison County Circuit Court's dismissal of his second petition for post-conviction relief without an evidentiary hearing. The petitioner raises the following issues on appeal:

- (1) the conduct of the court evidences a predisposition to dismiss the amended petition without a full and fair consideration of its merits;
- (2) the trial court applied an erroneous standard of waiver in dismissing fourteen (14) of the petitioner's claims;
- (3) the trial court violated the petitioner's constitutional rights in dismissing fourteen (14) of the petitioner's claims as being previously determined;
- (4) the trial court erred in dismissing the claims based on the principles enunciated in Brown;
- (5) the evidence was insufficient to warrant the trial court's original charge concerning aggravating circumstances and the jury's subsequent imposition of the death penalty based upon the application of these circumstances;
- (6) the "heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague; and
- (7) the petitioner's constitutional rights were violated when he was denied funds for expert investigative services.

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**BACKGROUND**

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The petitioner was convicted of first degree murder and sentenced to death. The conviction was affirmed on direct appeal. State v. Melson, 638 S.W.2d 342 (Tenn. 1982), cert. denied 459 U.S. 1137, 103 S. Ct. 770 (1983).

The petitioner filed his first post-conviction petition on May 31, 1985, raising some fifteen issues concerning the constitutionality of the death penalty, jury bias, improper venue, improper jury instructions, misapplication and misinterpretation of aggravating and mitigating circumstances, inadequate appellate review, evidentiary errors, ineffective assistance of counsel, procedural errors, and the illegality of the

arrest and the search. After an evidentiary hearing, the trial court dismissed all claims other than ineffective assistance of counsel, concluding that they had been previously determined or waived. A hearing was conducted on the sole issue of ineffective assistance of counsel, with some thirteen witnesses, including trial counsel for the petitioner, testifying. The trial court then determined that counsel's performance had not been deficient and that the services rendered by counsel had been within the range of competence demanded in criminal cases. On appeal, this court reversed the trial court in part and remanded the case for a new sentencing hearing. State v. Hugh Melson, No. 8, Madison County (Tenn. Crim. App. Aug. 10, 1988), app. granted (Tenn. Dec.12, 1988). The state appealed, and the Tennessee Supreme Court reversed this court and affirmed the judgment of the trial court. State v. Melson, 772 S.W.2d 417 (Tenn. 1989), cert. denied 493 U.S. 874, 110 S. Ct. 211(1989).

The petitioner, proceeding pro se, filed a second petition for post-conviction relief on June 30, 1989. On March 30, 1990, the trial court dismissed the petition without conducting an evidentiary hearing, finding that the petition had been competently drafted and that all grounds had been waived by the petitioner's failure to raise them in his first petition. This court reversed and remanded this case for the appointment of counsel and further proceedings, if necessary. Hugh Melson v. State, No. 29, Madison County, (Tenn. Crim. App. Dec. 5, 1990). The state appealed, and the supreme court granted review principally to determine what constitutes a "knowing and understanding" waiver under T.C.A. § 40-30-111(b)(1) of the Tennessee Post-Conviction Procedure Act.<sup>1</sup> The supreme court initially reversed this court's opinion and affirmed the judgment of the trial court. Appointed counsel filed a petition to rehear, and the supreme court withdrew its former opinion and remanded this case to the trial

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<sup>1</sup>For cases filed on or after May 10, 1995, T.C.A. §§ 40-30-101 to 40-30-124 are replaced by T.C.A. §§ 40-30-210 to 40-30-222. 1995 Tenn. Pub. Acts ch. 207.

court for the appointment of counsel and, if necessary, amendment of the petition and an evidentiary hearing.

The petition was amended in its present form and filed on June 10, 1993.

In it the petitioner raised the following grounds for relief:

- (1) insufficient evidence of deliberation or premeditation;
- (2) jury instruction incorrectly defined the deliberation element of first degree murder;
- (3) desires of victim's family for death sentence improperly communicated to jury;
- (4) improper closing argument to jury;
- (5) prejudicial reliance on nonstatutory aggravators;
- (6) prosecutor's closing argument diminished jury's responsibility;
- (7) petitioner denied equal protection by virtue of wealth of victim's family;
- (8) trial counsel's failure to investigate mitigation issues;
- (9) trial counsel's failure to present mitigation prevented meaningful appellate review;
- (10) ineffective assistance of trial counsel;
- (11) trial counsel prejudicially waived voir dire;
- (12) trial counsel's failure to rebut suspect conclusions of medical examiner;
- (13) trial counsel drew attention to custodial status of petitioner;
- (14) trial counsel misinformed the jury regarding standard for presumption of innocence;
- (15) trial counsel argued conflicting defense theories;
- (16) no proof to support "avoiding arrest" aggravator;
- (17) insufficient proof to support "heinous, atrocious, or cruel" aggravator;
- (18) misleading charge on statutory aggravators;
- (19) improper jury instructions;

(20) prejudicial judicial remarks transformed mitigator to aggravator;

(21) erroneous jury charge regarding presumption of truthfulness;

(22) disparate treatment in jury selection process;

(23) trial counsel was denied the opportunity to rehabilitate jurors;

(24) erroneous hearsay ruling;

(25) prejudicial refusal to grant time to trial counsel to prepare for penalty phase;

(26) "Expert" erroneously allowed to testify;

(27) denial of fair and impartial jury;

(28) unconstitutionality of death penalty statute; and

(29) ineffective assistance of prior counsel.

The petitioner filed a motion to proceed ex parte and under seal in seeking funds for expert and investigative services. The trial court granted the motion to proceed ex parte, but initially denied the request for services. The state filed an answer to the petitioner's petition, and on October 5, 1993, a prehearing status conference was held. At the conference, the trial court requested that the petitioner file, under seal, a more detailed request for investigative and expert services. The petitioner filed a request which specified the types of experts that would be needed and why their services would be necessary. On January 5, 1994, the trial court issued a fifteen-page memorandum opinion in which it concluded that claims (1), (4), (5), (6), (8), (9), (10), (11), (16), (17), (18), (27), (28), and (29) had been previously determined, that all other claims except claim (2) had been waived, and that in claim (2), the instruction recommended in State v. Brown, 836 S.W.2d 530 (Tenn. 1992), was not mandated by either the state or federal constitution and the instruction as given presented no danger of unfairness in the instant case in light of the circumstances surrounding the offense.

#### **PREDISPOSITION TO DISMISS**

In his first issue, the petitioner contends that when viewed in their entirety and collectively, the actions of the trial court in dismissing the amended petition evidences a predisposition to dismiss without a full and fair consideration of the petition's merits. Specifically, the petitioner claims that the trial court mischaracterized the nature and purpose of the prehearing conference held on October 5, 1993, gave only "lip service" to the petitioner's request for funds for expert and investigative services, and provided no analysis, merits assessment, or attempt at individual issue evaluation in its January 1994 order dismissing the petition.

The record does not support the petitioner's claims. In a September 1993 order, the trial court scheduled the October 1993 prehearing conference for the explicit purpose of "defining the issues, if any, requiring an evidentiary hearing." The conference was held, and counsel for the petitioner articulated those issues which, in counsel's opinion, necessitated an evidentiary hearing. In response, counsel for the state argued that all of the issues had been either waived or previously determined and did not merit an evidentiary hearing. At the conclusion of the hearing and at the petitioner's request, the trial court granted the petitioner an additional fifteen days in which to file an additional brief in reply to the state's answer to the amended petition.

The record reveals that the trial court did not mischaracterize the nature of the October 1993 conference. Moreover, the trial court granted the petitioner additional time to answer the state's answer. Though the opinion collectively grouped and summarily addressed certain issues, the court provided supporting law for all of its conclusions.

In regard to the petitioner's request for investigative and expert services, the trial court did, in fact, allow the petitioner to proceed ex parte and submit a more detailed request for these services. We note that the law at the time of the court's

ruling was unsettled. In Teague v. State, 772 S.W.2d 915 (Tenn. Crim. App. 1988), app. denied (Tenn. 1989), this court held that post-conviction capital case petitioners are not entitled to expert or investigative services at state expense. However, in a later unpublished decision, a different panel of this court concluded that trial courts have the discretionary power to provide expert services when necessary to ensure the protection of the constitutional rights of a capital case petitioner. Gaile K. Owens and Pervis T. Payne v. State, Nos. 02C01-9111-CR-00259 and 02C01-9204-CR-00094, Shelby County (Tenn. Crim. App. Mar. 25, 1994), app. granted (Tenn. Jul. 25, 1994).<sup>2</sup>

Although the trial court only summarily addressed the petitioner's request for services in its order and memorandum opinion, we conclude that the result is consistent with the trial court's determination that all issues had been previously determined or waived and that it does not evidence a predisposition to dismiss the petition. Accordingly, this issue is without merit.

### **ISSUES WAIVED**

The petitioner next contends that the trial court erred in holding that claims (3), (7), (12), (13), (14), (15), (19), (20), (21), (22), (23), (24), (25) and (26) had been waived. Specifically, relying on unpublished decisions of this court, the petitioner claims that the trial court erroneously used an objective rather than subjective standard in holding that a personal and knowing waiver is not required under the Post-Conviction Procedure Act and that counsel's failure to raise an issue can be imputed to the petitioner.

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<sup>2</sup> In Owens v. State, 908 S.W.2d 923 (Tenn. 1995), the Tennessee Supreme Court reversed the lower court in part and remanded, holding that T.C.A. § 40-14-207(b)(which authorizes expert services if necessary for the protection of the constitutional rights of an indigent defendant) applies to post-conviction capital cases and that when certain procedural criteria are satisfied, an indigent petitioner in a post-conviction capital case is entitled to an ex parte hearing to determine the necessity of such services.

The Tennessee Supreme Court has resolved this issue in House v. State, 911 S.W.2d 705 (Tenn. 1995). The court held as follows:

We conclude that a “full and fair hearing” sufficient to support a finding of previous determination occurs if a petitioner is given the opportunity to present proof and argument on the petition for post-conviction relief. We further conclude that the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally and therefore, “knowingly and understandingly,” waive a ground for relief. Instead, waiver is to [be] determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. Finally, we conclude that there is no right to effective assistance of counsel in post-conviction proceedings, and therefore, an allegation of ineffective assistance of prior post-conviction counsel does not preclude application of the defenses of waiver and previous determination.

911 S.W.2d at 714. Essentially, the court determined that a petitioner is bound by the action or inaction of counsel, or his own ignorance, unless the constitutional right at issue is a fundamental one that may only be waived personally and knowingly by a defendant-petitioner.

Under House, the petitioner’s allegations that he did not knowingly and understandingly forgo his present grounds for relief in the previous petition or direct appeal and that neither his trial nor post-conviction attorneys consulted with him about those grounds or about the decision whether to raise those issues in any of the earlier proceedings are for naught in that they do not provide justification for his failure to present these issues in his previous post-conviction case. He does not allege the violation of any right for which a personal waiver is required. Accordingly, his allegations do not rebut the presumption of waiver provided by T. C. A. § 40-30-112(b), and this issue is without merit.

#### **ISSUES PREVIOUSLY DETERMINED**

The petitioner next argues that the trial court erred in concluding that certain claims had been previously determined. The trial court concluded that fourteen claims had been previously determined, and the petitioner now contests this ruling as to

eight of the claims. Specifically, he contends that claim (1) has not been previously determined in light of State v. Brown, 836 S.W.2d 530 (Tenn. 1992) and State v. West, 844 S.W.2d 144 (Tenn. 1992), that claims (8) and (9) have not been presented in that they address the ineffectiveness of counsel as related to trial counsel's failure to investigate, that claims (10) and (11) should have been reviewed in that they relate to new allegations of ineffective assistance of counsel, that claims (16) and (17) concerning aggravating circumstances should have been reviewed because they had never been adequately argued or considered, and that claim (29) should be reviewed in that it relates to the ineffectiveness of post-conviction counsel.

The petitioner's claim (1) alleges insufficiency of the evidence relating to premeditation and deliberation under the supreme court's decision in Brown. However, in the instant case, the petitioner challenged the sufficiency of the evidence on direct appeal. Melson, 638 S.W.2d at 347-350. The supreme court stated that it "had no hesitancy in holding that the evidence against Melson was sufficient to support the first degree murder conviction beyond a reasonable doubt." Id. at 350. This court has previously concluded that Brown does not present a new constitutional rule or new right relative to the elements of first degree murder. See Timothy Wayne Peters v. State, No. 03C01-9409-CR-00331, Sullivan Co. (Tenn. Crim. App. Oct. 30, 1995), app. denied (Tenn. Apr. 1, 1996). Thus, no basis exists for revisiting the issue of evidence sufficiency. Accordingly, we agree with the trial court that this issue has been previously determined.

Petitioner's claims (8) and (9) concern ineffectiveness of trial counsel as it relates to failure to investigate mitigation issues and thereby results in a lack of meaningful appellate review. The petitioner now contends that these issues should not have been held to have been previously determined as they are separate and distinct from the allegations in his first post-conviction petition, which claimed ineffective

assistance of trial counsel for failure to produce any proof in the sentencing hearing and failure to provide a proper closing argument in the sentencing phase. We do not agree.

The petitioner's first post-conviction petition was some forty-two pages in length and presented all of the issues that were raised at the original trial and appeal plus some additional legal questions. The trial court dismissed all of the allegations except those relating to ineffective assistance of counsel and held a hearing on the ineffective assistance issue. Thirteen witnesses, including both of petitioner's trial counsel, a member of the petit jury panel who was not selected as a juror, nine relatives and acquaintances of the petitioner, and one expert on the defense of capital cases testified. After reviewing the trial record and the evidence presented at the post-conviction hearing, the trial court concluded that counsel's performance was not deficient and that the services rendered by counsel were within the range of competence demanded in criminal cases.

On appeal, however, this court concluded that the evidence preponderated against the trial court's finding that counsel's decision not to call witnesses at the sentencing hearing was a reasonable exercise of trial tactics. This court affirmed the conviction of the petitioner, but reversed the sentence of death and remanded the case to the trial court for a new sentencing hearing. See State v. Hugh Melson, No. 8, Madison County (Tenn. Crim. App. Aug. 10, 1988), app. granted (Tenn. Dec. 12, 1988). The Tennessee Supreme Court disagreed with the intermediate court's ruling and affirmed the judgment of the trial court. See State v. Melson, 772 S.W.2d 417 (Tenn. 1989). Referring to the fact that the petitioner had been permitted to call eight character witnesses who testified, "without contradiction or impeachment, to [the] petitioner's reputation for peacefulness and quietude," the court concluded that nothing concerning mitigation had been adduced at the post-conviction hearing which could have added anything to that which had already been placed in the record during the

guilt phase. Id. at 418. The court also cited to its original opinion on direct appeal in which it had noted that “[c]ounsel explored every legal question and every factual issue which apparently was open to them under the circumstances of the case . . . .” Id. at 420.

In the present appeal, the petitioner attempts to distinguish the claim he raises in regard to ineffective assistance of counsel by asserting that he is now referring to counsel’s failure to investigate and prepare for the presentation of any mitigating evidence at his sentencing hearing. We decline to make such a distinction and conclude that the trial court did not err in its determination that the issue of ineffective assistance was previously determined. See John L. Bates v. State, No. 03C01-9208-CR-00279, Hamilton Co. (Tenn. Crim. App. May 6, 1993), app. denied (Tenn. Nov. 1, 1993); William Edward Blake v. State, No. 03C01-9212-CR-00444, Knox Co. (Tenn. Crim. App. Aug. 17, 1993). Even if this court were to recognize new grounds alleging ineffective assistance of counsel, though, relief would still not be warranted, because pursuant to the supreme court’s holding in House, they are deemed to be waived for not being raised in the first post-conviction case.

The petitioner also claims that counsel’s failure to investigate or develop mitigating evidence prevented meaningful appellate review. Again, however, we conclude that the issue of effective assistance of counsel has been previously determined in that the supreme court previously held that counsel had not been remiss in failing to present cumulative mitigation evidence that had already been presented at the guilt phase of the trial. This issue is without merit.

The petitioner next argues that the trial court’s conclusion that claims (10) and (11), regarding the effective assistance of trial counsel, were previously determined was erroneous. Claim (10) involved allegations of specific instances of ineffective

representation involving counsel's failure to secure a fair and impartial jury, failure to successfully attain a change of venue, failure to object to jury instructions, failure to make a proper record of error, failure to object to improper closing argument by the state, failure to include all trial errors in the petitioner's motion for a new trial, failure to offer proof about the discriminatory impact of the death penalty, and failure to retain a "blood splatter expert." In claim (11), the petitioner complained that trial counsel prejudicially waived voir dire of the last juror. As previously noted, however, even if the petitioner could successfully argue that these issues have not been previously determined, the petitioner has waived them pursuant to the supreme court's holding in House and T. C. A. § 40-30-112(b) [repealed].

In claims (16) and (17), the petitioner argues that the trial court's charge concerning aggravating circumstances and the jury's application of the circumstances, these being that the crime was heinous, atrocious or cruel and that it was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution, was a violation of the petitioner's rights inasmuch as the record was devoid of any proof to support either charge. See T. C. A. §§ 39-2404(i)(5), 39-2404(i)(6) (1982). However, the record reveals that both of these claims were presented on direct appeal and in the first post-conviction petition.

On direct appeal, the supreme court concluded that the heinous, atrocious or cruel instruction was not unconstitutionally vague or overbroad and that this factor was definitely applicable in that "the uncontradicted proof show[ed] that Mrs. Lawrence had defensive injuries to her arms and hands, proving that there was time for her to realize what was happening, to feel fear, and to try to protect herself." Melson, 638 S.W. 2d at 367. The court also noted that "a killing wherein the victim is struck up to thirty times, causing an entire room to be covered with a spray of flying blood, and

causing the victim's brains to extrude through the gaping hole in her skull, evidence[d] depravity of mind." Id.

The court further concluded that the evidence supporting the application of the aggravating circumstance involving the prevention of arrest or prosecution was sufficient in that "Mrs. Lawrence had threatened to expose [the petitioner's] alleged theft of gasoline" and the petitioner had told two people on the day of the murder that he was "in a heap of trouble," and that the victim could not "tell Mr. Jack and have Mr. Jack coming back there raising hell with him." Id. We conclude that this issue has been previously litigated and determined.

In claim (29), the petitioner contends that post-conviction counsel in the first post-conviction case was ineffective for failing to raise issues set forth in this successor post-conviction petition. However, in House, the supreme court not only held that there is no constitutional or statutory right to the effective assistance of counsel in post-conviction proceedings, but specifically rejected the holding that the ineffective assistance of counsel in a prior post-conviction proceeding is an important factor to consider when determining whether a claim has been previously determined or waived. 911 S.W.2d at 714. This issue is also without merit.

#### **INSTRUCTION ON PREMEDITATION AND DELIBERATION**

\_\_\_\_\_ In claim (2), the petitioner argues that the trial court erred in dismissing the claim due to the principles enunciated in State v. Brown, 836 S.W.2d 530 (1992). Specifically, he claims that the instruction given at his trial that intent can be "deliberately formed in an instant" was erroneous and that the court's holding in Brown should be considered a new constitutional rule of law which warrants retrospective application.

As we have previously discussed in the “issues previously determined” portion of this opinion, this court has consistently held that Brown merely offered guidance, did not create a new constitutional rule relative to jury instructions, and should not be retroactively applied. See State v. Ray, 880 S.W.2d 700 (Tenn. Crim. App. 1993), State v. Jimmy Sills, No. 03C01-9410-CR-00370, Hamilton Co. (Tenn. Crim. App. May 10, 1995), app. denied (Tenn. Sept. 11, 1995); Larry Cravens v. State, No. 01C01-9404-CR-00143, Fentress Co. (Tenn. Crim. App. Feb. 25, 1995). This issue is without merit.

### **UNCONSTITUTIONALLY VAGUE JURY INSTRUCTION**

The petitioner next asserts in claim (19) that even though he has previously raised the claim that the heinous, atrocious or cruel aggravating instruction is constitutionally vague, the development of new case law since the issue was raised creates a need for this issue to be re-examined. Specifically, the petitioner cites supreme court language in State v. Black, 815 S.W.2d 166, 181 (Tenn. 1991), for the proposition that the jury should be properly instructed on the meaning of the terms used in the statute in accordance with State v. Williams, 690 S.W.2d 517, 521 (Tenn. 1985).

While it is true that in Williams the supreme court expressed a preference that juries be fully instructed as to the definitions of the terms heinous, atrocious or cruel, the court has consistently held that the language as expressed in the statute is not unconstitutionally vague or overbroad. See Hartman v. State, 896 S.W.2d 94, 106 (Tenn. 1995); State v. Henley, 774 S.W.2d 908, 918 (Tenn. 1989); State v. Taylor, 771 S.W.2d 387, 399 (Tenn. 1989). Accordingly, this issue is without merit.

### **EXPERT INVESTIGATIVE SERVICES**

Lastly, the petitioner argues that the trial court wrongly failed to authorize funds for expert investigative services. However, given the fact that the petitioner has

presented no justiciable grounds for relief, the trial court did not err in denying funds for expert investigative services to explore the meritless claims. Accordingly, this issue is also without merit.

**CONCLUSION**

Although the trial court summarily denied post-conviction relief, in consideration of the foregoing and the record as a whole, we conclude that no error was committed. The petitioner has not overcome the presumption that the claims he raises were previously determined or are waived. Accordingly, the judgment of the trial court dismissing the petition is affirmed.

This court previously granted a stay of execution pending the disposition of the petitioner's petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee. The petition for a writ of habeas corpus having been dismissed by the United States District Court for the Middle District of Tennessee on January 3, 1992, and the denial of the petitioner's petition for post-conviction relief having been affirmed by this court, we establish a new execution date and direct that the sentence be carried out as provided by law on January 20, 1997, unless otherwise stayed or modified by appropriate authority.

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Joseph M. Tipton, Judge

CONCUR:

\_\_\_\_\_  
Joe B. Jones, Judge

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John H. Peay, Judge

